

Internal Revenue Service
memorandum

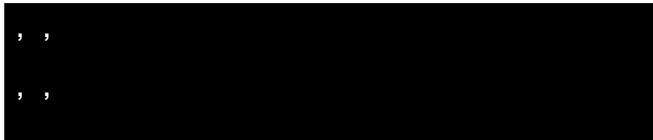
date: JAN 22 1991

TO: Director, Internal Revenue Service Center
Kansas City, MO
Attn: Entity Control

from: Technical Assistant
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1483-90
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter dated November 2, 1990, from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of the:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion reached by the Board that [REDACTED] is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

(Signed) Ronald L. Moore

RONALD L. MOORE

Attachment: Copy of letter from
the Railroad Retirement Board

cc: Mr. Gary Kuper
Internal Revenue Service
200 South Hanley
Clayton, MO 63105

008965

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 RUSH STREET
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

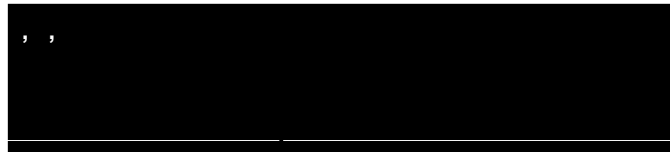
Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)
Internal Revenue Service
1111 Constitution Avenue., N.W.
Washington, D.C. 20224

NOV 02 1990

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

A handwritten signature in cursive script, appearing to read "Steven A. Bartholow".

Steven A. Bartholow
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

MEMORANDUM

OCT 31 1990

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]

This is in reply to your Form G-215 of April 6, 1990, requesting my opinion as to the status of the employees of [REDACTED] under the Railroad Retirement and Railroad Unemployment Insurance Acts. As discussed below, I have determined that these individuals are not covered employees within the meaning of the Acts.

[REDACTED] was incorporated on [REDACTED], as an [REDACTED] corporation. Evidence regarding [REDACTED]'s business subsequent to incorporation has been obtained from the [REDACTED], from the [REDACTED], and from [REDACTED] itself. This evidence establishes that no officer or director of [REDACTED] has ever been an officer or director of any railroad, and no railroad has ever owned any interest in [REDACTED]. On [REDACTED], [REDACTED] contracted with the [REDACTED] "to furnish transportation for Railroad's train and engine crews, as specified by Railroad Company's designated representatives in the vicinity of [REDACTED]." [REDACTED] and [REDACTED] entered into a similar agreement with respect to transportation between some [REDACTED] destinations in [REDACTED], and [REDACTED] ([REDACTED]'s "division) on [REDACTED]. The [REDACTED] approved [REDACTED]'s passenger motor carrier service by permit number [REDACTED]. The Interstate Commerce Commission also issued to [REDACTED] motor carrier license number [REDACTED]. There is no evidence regarding [REDACTED]'s procurement of motor carrier licenses in [REDACTED] or [REDACTED].

Both contracts required [REDACTED] to furnish and maintain motor passenger vehicles and and drivers sufficient for [REDACTED]'s needs. [REDACTED] must comply with any legal requirements, including appropriate licensing. [REDACTED] must indemnify the [REDACTED] from liability and maintain personal injury and property damage insurance, naming [REDACTED] as an additional insured. [REDACTED] agrees to pay [REDACTED] per mile or per trip, with an additional charge for delays in service caused by [REDACTED]. Both contracts prohibit [REDACTED] from transporting other passengers while carrying [REDACTED] crew members. Both contracts run for a period of [REDACTED] years. The

It appears that [REDACTED] has available for service under these contracts [REDACTED] passenger trucks and [REDACTED] to [REDACTED] drivers. [REDACTED] hires and fires these drivers, who are compensated on an hourly basis. Drivers sign an employment contract listing the driver's responsibilities. [REDACTED] dispatchers generally direct drivers to their destinations, and [REDACTED] employees may give drivers further instructions regarding destinations within the scope of the contract. It appears that [REDACTED] vehicles are equipped with radio receivers which may be tuned to frequencies used by [REDACTED] communications; it also appears that [REDACTED] vehicles may stock some [REDACTED] supplies used by [REDACTED] train crews. On occasion [REDACTED] employees keep daily logs of [REDACTED] employees who have exhausted their hours of service under the Hours of Service Act (45 U.S.C. §§ 61-66).

The [redacted] contracts with [redacted] account for [redacted] percent of [redacted]'s current business. [redacted] has negotiated for similar contracts with other railroads, without success to date. [redacted] also has a [redacted] and a [redacted], and indicates that it has

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undertaken to expand business into several other fields, including [REDACTED]

[REDACTED] and [REDACTED]. For its part, [REDACTED] has similar contracts with other companies unrelated to [REDACTED].

Section 1(a)(1) of the RRA (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

"(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;"

"(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *."

Sections 1(a) and 1(b) of the RUIA (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. §§ 3201-3233).

With regard to employees, section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the Retirement Act further defines an individual as "in the service of an employer" when:

"(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *."

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

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As [REDACTED] is neither under common ownership with a rail carrier nor controlled by officers or directors who control a railroad, it is my opinion that [REDACTED] is not under common control with a rail carrier.

[REDACTED] has a substantial investment in equipment, including equipment used for purposes not dedicated to the [REDACTED] contracts. The contracts between [REDACTED] and [REDACTED] do not guarantee [REDACTED] a profit, and generally indicate that they constitute a fairly negotiated transaction between independent parties. [REDACTED] has undertaken to qualify itself as a motor carrier with the Interstate Commerce Commission and the state of [REDACTED]. The evidence as a whole establishes that [REDACTED] is a bona fide firm engaged in an independent trade.

Whether the duties of the drivers render them subject to the continuing authority of the [REDACTED] to supervise and direct the manner of rendition of their duties within the meaning of RRA subsection 1(d)(1)(i)(A) presents a more difficult question. Some factors point toward a conclusion that the drivers are in the service of the [REDACTED]. They perform a task previously done by [REDACTED] employees. Indeed, the Public Law Board held that in-terminal transportation service must be reserved to [REDACTED] employees by reason of a collective bargaining agreement. [REDACTED]'s drivers apparently maintain certain personnel records for the use of [REDACTED] management, and may receive directions to proceed to particular locations from [REDACTED] employees. [REDACTED] drivers stock some [REDACTED] supplies in the trucks, presumably at the behest of [REDACTED] management. On the other hand, [REDACTED] selects the drivers for duty, and determines their rate of compensation and their hours of duty. [REDACTED] supplies the drivers with the basic piece of equipment, the truck, and insures against any liability for negligent operation. Finally, [REDACTED] determines whether a driver devotes his time to service under a [REDACTED] contract, or to service to another client. In my opinion, the latter factors predominate and indicate control by [REDACTED] and not by [REDACTED].

It is therefore my opinion, based upon the totality of the evidence, that the drivers of the passenger trucks furnished by [REDACTED] under contract with [REDACTED] are not employees of the [REDACTED] for purposes of the Acts. An appropriate form G-215 giving effect to the foregoing is attached.


Steven A. Bartholow